



Sketch by Connie Pratt

and her attorney, Mark Sisti, seated, listen yesterday as attorney Jay Acton, also represents before Judge Douglas Gray in Rockingham County Superior Court.

# Smart Appeal: Judge on Trial

By DEENA FERGUSON  
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**BRENTWOOD** — Were Pamela Smart's rights violated when — away from the press and Smart — Judge Douglas Gray told the jury in her murder conspiracy trial to "bring their toothbrushes" to court on March 22, 1991?

The next day, the jury reached its verdict and Smart's attorneys say the conversation — during which Gray told the jury that they would be sequestered over Easter weekend — may have influenced the jury to reach a hasty verdict in the case.

That is the crux of Smart's appeal heard yesterday in Rockingham County Superior Court.

Smart, the star of the show six years ago during her trial on charges she convinced her teenage lover to kill her husband, sat almost forgotten in the courtroom yesterday as her lawyers tried to put the judge on trial.

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Jim Cole/

PAMELA SMART sits in a cruiser as she leaves Rockingham County Superior Court yesterday.



## PAM SMART

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Smart, now 29, is serving a mandatory life sentence with no chance of parole for being an accomplice to first-degree murder. She also was convicted of conspiracy to commit murder and witness tampering.

Judge Douglas Gray denied a defense request to excuse himself from hearing part of her appeal.

In his conversation with the jury, Gray could have said something else that influenced the outcome of the trial, New York lawyer Jay Acton argued yesterday, but no one will ever know because there is no record of the judge's remarks.

"The petitioner had a constitutional right to be present for those conversations," Acton told Gray. "And no record of them exists. The state would have you believe that these are not important matters. But it's simply disingenuous to say these matters aren't important."

"The petitioner finds it amazing that no one is able to tell us that your honor's ex parte contact with a deliberating jury concerned only the sequestration of that jury. How can she know without a record?" Acton said.

"I'll tell you how you can know," Gray said, leaning forward and pulling his glasses from his nose. "I took an oath concerning my office. That's how you know."

Acton and attorney Mark Sisti of Concord asked Gray to make amends by setting aside Smart's conviction and ordering a new trial.

Short of that, Acton said he wants Gray to recall all 12 of the jurors who convicted Smart and ask them how Gray's comments may have influenced their decision to convict Smart, then 22 years old.

"Your honor is a very imposing man," Acton said. "You are an imposing presence in your robes. ... We all speak a silent language. Our body language sends off signals. Perhaps the jury took some signal from your honor" that influenced the outcome of the trial.

"I cannot apologize for the way I look," Gray replied.

Prosecutor Ann Rice also said that Gray's appearance is not grounds for a new trial.

"I don't believe we can overturn verdicts based on genetic traits," she said.

In response to the defense attorney's arguments, Rice said that it was Smart's lawyers at the time who requested the jury be sequestered and asked Gray to tell the jurors the sequestration was due to excessive media coverage.

And, "There is no record because no record was requested" by Smart's attorneys, Rice said.

Rice also said that Smart's attorneys could have contacted and questioned the original jurors as part of their motion for a new trial.

Rice said to recall the jury at this point would be a waste of money.

But Sisti told Gray that to bring the jury back for questioning would "be the cure for having no record at the time" of the conversation between Gray and the jurors.

"My recollection is just as faulty as yours, your honor," Sisti said, prompting Gray to look over his glasses at him.

"And just as good as your recollection," Sisti added quickly. Smart, who has been in a women's prison in Bedford Hills, N.Y., since 1993, looked strained and nervous during the half-hour hearing in Rockingham County Superior Court.

Dressed in a pale yellow dress and flat shoes, she sat silently during the hourlong hearing, except to whisper to one of her lawyers.

Family members, friends and supporters filled half the benches behind her and Smart often looked back over her shoulder at them. She also seemed to be looking at the nearly 30 reporters who crowded in for the hearing.

Gray did not immediately rule on the appeal, which also claims that media publicity before and during her trial biased the jury.

By deciding to ban cameras and tape recorders from yesterday's hearing and reserving only eight seats for reporters — although many more ended up getting seats — Gray effectively admitted he let the news media go too far in 1991, her mother said yesterday.

"We're not asking him for anything special," Linda Wojas said after the hearing. "All we want ... is what everyone else gets in this state, a fair trial, without the wall of hate that surrounded her trial."

She also told reporters that Smart was assaulted in prison. She required surgery because her skull was fractured and a metal plate was inserted in her skull, Wojas said.

Gregg Smart was shot to death when he arrived home at the couple's Derry condo on May 1, 1990.

The Smarts were to celebrate their first wedding anniversary a week later. But for several months, Pam Smart had been engaged in a torrid affair with Billy Flynn, 16, her student in a self-esteem course she had volunteered to teach at Winnacunnet High School in Hampton, where she was the media services director.

Flynn testified that Pam Smart helped plan the killing to make it look like a burglary.

Speaking after the hearing, Sisti said he is "always positive" after leaving a hearing.

"We obviously think we have a strong case for a new trial here," he said, "or we would not have brought this forward."

Acton said that if Gray grants the motion for a new trial, Smart would be returned to New Hampshire and would go to trial again. If Gray agrees to bring the jury back for questioning, Smart would also return from New York. Information from that hearing would be used to further her appeals.

If Gray rejects the motion for a new trial, Acton said the case will be sent to the New Hampshire Supreme Court in Concord for possible review.

If that appeal fails, Acton said he will file a writ of habeas corpus in federal court.

(The Associated Press also contributed to this report.)